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IN THE

Supreme Court of the United States

NO. ..... OCTOBER TERM—1951

OWEN P. BARNES, JR., AND CHARLES E. MANGIERI,
Petitioners

VS.

UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 23, 1952, denying a motion for rehearing of judgment entered by said Court on November 13, 1951 (R-794).

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered January 23, 1952 (R-794). The jurisdiction of this Court is invoked under U. S. C., Sec. 1254(1).

Opinions Below

The District Court for the Southern District of Georgia, Savannah Division did not render an opinion. The opinion of the Court of Appeals for the Fifth Circuit is reported in 192 Fed. (2nd) 466. This opinion is incorporated in the record at Pages 788-790.

Questions Presented

1. Whether petitioners Barnes and Mangieri could be convicted of the violation and conspiracy to violate the National Bankruptcy Act by concealing and transferring assets when petitioner Mangieri, trading as M. L. & A. Timbers, was adjudicated a bankrupt, and the evidence discloses that petitioner Barnes was the owner of and in control of M. L. & A. Timbers, and had not been adjudicated a bankrupt.

2. Whether petitioner Barnes and Mangieri could be convicted of the violation and the conspiracy to violate the National Bankruptcy Act by concealing and transferring assets when all acts of transferring alleged took place prior to bankruptcy, and the jury in the trial court found Petitioners not guilty of count alleging concealment of money and assets at time of adjudication of bankruptcy, and at the time the indictment was returned.

Statutes Involved

The pertinent provisions of Title 11, Section 52 and Title 18, Sections 151, 152 and 371, as amended, are set forth in the Appendix.

Statement of Case

The Petitioners, Owen P. Barnes, Jr., and Charles E. Mangieri, were indicted in the Southern District of Georgia,

Savannah Division, and charged in 45 counts with conspiracy to violate and violation of the National Bankruptcy Act (R-65).

The first count of the indictment charged Petitioners with conspiracy to violate the National Bankruptcy Act of which they were found guilty.

Counts 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 40, 42, and 44 charged Petitioner Barnes (R-25-64) with transferring property in contemplation of the bankruptcy of Charles E. Mangieri. Petitioner Barnes was convicted upon each of these counts (R-66).

Counts 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 38, 41, 43 and 45 charged both Petitioners with transferring property to defeat the National Bankruptcy Act (R-26-65). Petitioner Mangieri was found not guilty of all these counts and Petitioner Barnes was found guilty of all counts (R-66).

Counts 30, 32, 34, and 37 charged Petitioner Barnes with concealing assets of Petitioner Mangieri in contemplation of bankruptcy. Petitioner Barnes was convicted upon each of these counts.

Count 36 charged both Petitioners with concealing approximately $41,099.41 of the assets of Charles E. Mangieri from the trustees in bankruptcy. Both Petitioners were acquitted on this count.

Count 39 charged both Petitioners with destroying the records, books and documents relating to the property and affairs of Charles E. Mangieri, in contemplation of his bankruptcy. Both Petitioners were convicted on this count.

To Summarize:

Petitioner Owen P. Barnes, Jr., was convicted upon each count of the indictment, except Count 36 as to which he was acquitted.

Petitioner Charles E. Mangieri was convicted upon Counts 1 and 39, and was acquitted upon all other Counts.

In December, 1946, Petitioner Mangieri and a Mr. Ward entered into the lumber business under the name of "M. L. & A. Timbers" (R-494). However, all the money that went into this business belonged to Petitioner Barnes (R-495). Ward soon withdrew and Petitioner Barnes assumed control and supervision of the operation of M. L. & A. Timbers (R-496). At the time M. L. & A. Timbers was organized, Petitioner Barnes was a stockholder in and managed a corporation, Southern Furniture Specialties, Inc., engaged in manufacturing lumber for furniture dealers (R-491). Soon Southern Furniture Specialties, Inc., passed out of existence (R-508), and M. L. & A. Timbers became a business with Petitioner Barnes in complete control and Petitioner Mangieri working under his direction (R-508).

While Petitioner Mangieri hoped some day to have M. L. & A. Timbers as his own business, it does not appear from the record that he made any decisions or kept up with the business, but merely carried out the directions of Petitioner Barnes (R-624-627).

Prior to the Fall of 1947, M. L. & A. Timbers was becoming increasingly involved in debt. Creditors from whom lumber and other materials had been purchased began pressing for payment of their claims.

An involuntary petition in bankruptcy was filed against Charles E. Mangieri, trading as M. L. & A. Timbers, on

January 23, 1948, and he was adjudicated a bankrupt on February 25, 1948 (R-649).

M. L. & A. Timbers, during the Fall of 1947 and prior to petition in bankruptcy, purchased lumber from various companies on credit and sold said lumber for cash. Some of the creditors from whom lumber was purchased, during this time, have not been paid. The Government contended that Petitioner Barnes, realizing the financial condition of the business, used this means to secure cash with the intentions of withholding it from the creditors. In support of its contention, the Government introduced evidence showing all of the purchases and sales of the business from early Fall until the filing of petition in bankruptcy. The Petitioners countered by showing in detail the expenditures of the monies received and contended they were all for legitimate uses (R-535-550).

On January 17, 1948, there was a fire in the office of M. L. & A. Timbers, which partially destroyed books, records and furniture of the business (R-403-407). There was no competent evidence linking the Petitioners to the fire.

Decisions of the Lower Court

The opinion of the United States Circuit Court of Appeals, Fifth Circuit, affirming the conviction and sentences of the United States District Court for the Southern District of Georgia, appears to be summed up and expressed in the following language . . "In the process of buying on credit, selling for cash, and spending the cash, some creditors were being preferred over others thus defeating the administration of the bankruptcy law." (R-789)

Reasons for Granting the Writ

1. The Circuit Court of Appeads in affirming the conviction and sentences of the Petitioners based upon conspiracy

to violate and violation of the National Bankruptcy Act, by concealing and transferring assets is in conflict with applicable decisions of this Court in that the evidence discloses that the property involved actually belonged to Owen P. Barnes, Jr., and Owen P. Barnes, Jr., has never been adjudicated a bankrupt.

The bankruptcy proceedings involved in this case relate to Charles E. Mangieri as an individual trading as M. L. & A. Timbers. The trustee or receiver in bankruptcy would therefore be entitled to receive and administer only property belonging individually to Charles E. Mangieri.

Under previous decisions the offense of concealing assets under the National Bankruptcy Act must have been accomplished while a person was in bankruptcy, or after his discharge, and hence adjudication of bankruptcy is essential to the commission of the offense (U. SS. vs. Rhodes, 212 F 513; U. S. vs. Young, 170 F 110; Gilberston vs. U. S. 168 F 672).

There must be an actual concealment of property belonging to the estate of the bankrupt, from an officer of the Court charged with the custody or control of the property, after the appointment of such officer (U. S. vs. Cohan, 46 F (2nd) 310; U. S. vs. Grant, 1 F (2nd) 723).

Therefore, since the property of M. L. & A. Timbers was the property individually of Owen P. Barnes, Jr., and since Owen P. Barnes, Jr., has never been declared a bankrupt, the bankrupt estate was not entitled to the property belonging to M. L. & A. Timbers. Hence, it is contended that Petitioners Barnes and Mangieri could not be convicted of conspiracy to violate and violation of the National Bankruptcy Act by transferring or concealing assets of M. L. & A. Timbers.

2. The essence of the indictment as set forth in the 45 counts under which the Petitioners were tried, is concealing and transferring of property and assets in contemplation of bankruptcy. The transfers of property as alleged took place prior to the time that Petitioner Mangieri was adjudicated a bankrupt. In count 36 of the indictment, the Petitioners were alleged to have concealed monies and assets of the bankrupt estate in the sum of $41,099.41, continuously since adjudication of bankruptcy. The jury acquitted both Petitioners on this count. It appears that count 36, and the concealment of $41,099.41 represented the total amount of assets alleged to have been transferred and concealed in other counts of the indictment. The overt acts alleged in the conspiracy count, which was count 1, were substantially the same acts as charged in other separate counts. On the separate counts the jury found Petitioner Mangieri not guilty. It is evident, therefore, that any acts or transfers of property took place prior to bankruptcy, and that Petitioners had no concealed assets at the time Petition in Bankruptcy was filed. It is settled law that any such concealment by a bankrupt must be after the filing of petition against him in order to sustain a conviction of criminal concealment (In re: Agnew 225 F 650). In prosecution for fraudulent concealment of property from trustee in bankruptcy, the burden of proof is upon the Government to show concealment of funds alleged in indictment, and it is essential to show that this concealment continued down to the time trustee was appointed and thereafter with attempt to deprive trustee and creditors of such funds (Noell vs. U. S. 183 F (2nd) 334).

Therefore, since it appears that the transferring of the assets of M. L. & A. Timbers took place prior to Petition in Bankruptcy, and the jury found the Petitioners not guilty of having the monies and assets concealed at the time Petition in Bankruptcy was filed, the Petitioners Barnes and

Mangieri could not be convicted of concealing and transferring assets under the National Bankruptcy Act.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari be granted.

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AND
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Appendix

The relevant provision of Section 371, Title 18, United States Code, is as follows:

* * * *

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

* * * *

Section 152, Title 18, United States Code, provides:

* * * *

"Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation; or . ."

"Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt or . ."